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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

EALISE CRUMB,

Plaintiff and Appellant,

v.

KELLI JANE ROBERTS,

Defendant and Respondent.

B220679

(Los Angeles County  
Super. Ct. No. BC386836)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Conrad R. Aragon, Judge. Affirmed.

Ealise Crumb, in pro. per., for Plaintiff and Appellant.

Shaver, Korff & Castronovo, Tod M. Castronovo, Tina M. Bhatia for Defendant  
and Respondent.

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Plaintiff and appellant Ealise Crumb appeals from the judgment entered against her, on her complaint against defendants and respondents Kelli Jane Roberts, Progressive Insurance, and Edward Lim. We affirm.

### Facts

In March 2008, appellant sued Roberts for negligence. The complaint alleged that in March 2006, appellant and Roberts were involved in a car accident, that appellant was injured in the accident and had incurred medical expenses, that Roberts was at fault, that Roberts was insured by Progressive and had submitted information about the accident to Progressive, and that Progressive had offered only \$500 to settle the claim.

In May 2008, the court issued an Order to Show Cause re Dismissal for failure to serve the complaint. Appellant opposed the motion, contending that Progressive had advised Roberts to evade service and that Roberts had done so. Appellant was granted additional time to effect service. In fact, Roberts was never served, but in February 2009 she nonetheless filed an answer.

In the meantime, in October 2008, appellant substituted Progressive and Edward Lim, the Progressive claims representative assigned to the claim, for Doe defendants. Appellant served those parties. Their demurrer was heard in February 2009, and was sustained with leave to amend.

There were other key events in February 2009. On February 26, at a case management conference, trial was scheduled for September 22, 2009, and the parties were ordered to mediation with a completion date of August 28, 2009. On February 25, respondents noticed appellant's deposition for May.

On March 16, appellant filed her first amended complaint, bringing causes of action against Roberts for negligence and against all defendants for violation of the Fair Claims Settlement Practices Act, fraud, negligent hiring, negligent retention, negligent supervision, and negligent training. She also began to propound discovery.

In April 2009, respondents demurred to the first amended complaint. Progressive and Lim demurred to all causes of action against them and Roberts demurred to all causes of action except the cause of action for negligence. Hearing was set for May 15, but on the court's motion, was re-set for June 8, 2009.

Later in April, appellant informed respondents that she had had a death in the family and would not be available for her deposition in May, but would be available any time after June 10. Respondents took the deposition off calendar.

In May, respondents re-noticed the deposition for July 10. By letter of May 15, appellant agreed to that date.

Then, on May 29, appellant moved to continue the trial date, discovery cut-off date, and other dates scheduled in the case, contending that an April 9 death in her family meant that she could not return to California until June 10 to work on the case. She wrote, inter alia, that respondents would not be prejudiced because they had already caused delay, in that Progressive and Lim had instructed Roberts to evade service. Respondents opposed the motion and contested appellant's assertions about service of process.

On June 5, three days before respondents' demurrers were to be heard, appellant moved for an extension of time to respond, writing in her motion that she was still out of state, had not been reliably receiving her mail, and that respondents would not be prejudiced because they had caused delay, again concerning service of process. Our record does not include a ruling on this motion, but the demurrers were heard on June 8, as scheduled. They were sustained without leave to amend, leaving only the cause of action for negligence against Roberts.

On July 9, the day before her deposition, appellant left a voice mail message for respondents, saying that she would be unable to attend her deposition due to "a private and pressing matter." Respondents' counsel responded by letter, advising appellant that she was available for the deposition only on July 15, 2009, and asking that appellant confirm that date no later than July 13.

Appellant's motion to continue the trial was heard on July 7. The court denied the motion, finding that "This action was commenced over a year ago, on March 6, 2008, but plaintiff did not close the pleadings until January and February of 2009. Crumb did not serve written discovery until mid March of 2009. This long and unjustifiable delay in closing the pleadings and commencing discovery is chargeable to Crumb. Lack of diligence does not constitute good cause. While family demands have made plaintiff unavailable, they excuse the inaction only for the period from roughly April to June 2009, and do not excuse the lack of diligence for the one-year period from the date of filing until April of 2009."

On July 13, the date by which respondents had asked appellant to confirm her deposition, appellant informed respondents that she had filed a motion to disqualify the trial judge, and would not attend her deposition until a new judge had been assigned. Appellant did file such a motion, on July 14, contending that the trial judge had demonstrated bias and prejudice against her as a pro se litigant. The motion was stricken on July 20, on the ground that it failed to identify any legal ground for disqualification. Respondents re-noticed appellant's deposition for August 12.

On June 22, appellant filed a motion for reconsideration of the ruling on demurrers. On August 5, the motion was denied after a hearing.

Mediation was scheduled for August 18, 2009. On August 17, appellant filed a request for disqualification of the mediator, contending that the mediator was prejudiced against her.

Appellant did not appear at the final status conference, held on September 14. At the conference, the court issued Orders to Show Cause re appellant's failure to appear at the status conference and her failure to comply with Superior Court Rule 7.9, which governs case management conferences. Both OSCs were to be heard on the trial date, September 22. Appellant was given notice of the orders and was ordered to personally appear.

Appellant filed responses to the Orders to Show Cause, indicating that she had not appeared at the status conference and would not appear at the trial because the trial judge was biased against her. Appellant did not appear on September 22, and on respondents' motion the court dismissed the case with prejudice pursuant to Code of Civil Procedure section 581.

### Discussion

Appellant contends that the court abused its discretion when it dismissed the action under Code of Civil Procedure section 581, denied her motion to continue the trial date, denied her motion for an extension of time to oppose respondents' demurrers, denied her motion for reconsideration of the rulings on the demurrers, denied her motion to disqualify the trial judge, and denied her request for a new mediation date.

We consider the contentions in the order in which appellant raises them.

As appellant acknowledges, our review of a dismissal under Code of Civil Procedure section 581, subdivision (b)(3) is for abuse of discretion. (*Vernon v. Great Western Bank* (1996) 51 Cal.App.4th 1007.)

Appellant argues that she did not appear at trial because she would have suffered emotional distress if she had appeared before such a biased judge, that respondents caused delay by instructing Roberts to evade service of process, and that she was penalized because there had been a death in the family. None of these arguments establish abuse of discretion. Once appellant's motion for disqualification was denied, she was obligated to appear in court and pursue her complaint, or have that complaint dismissed. Her allegations concerning respondents' actions vis-à-vis service of process are irrelevant to this question, as is her brief absence from the state for her family emergency.

Under Code of Civil Procedure section 581, subdivision (b)(5), an action may be dismissed "By the court, without prejudice, when either party fails to appear on the trial and the other party appears and asks for dismissal." Appellant did not appear at trial,

after it is apparent that the non-appearance was deliberate. The court had ample ground to dismiss the case.

Our review of the motion to continue the trial date is also for abuse of discretion. (*Foster v. Civil Service Com.* (1983) 142 Cal.App.3d 444, 448.) Again, we see no abuse of discretion. As the court observed, appellant was not diligent in pursuing this case, and, as the court observed, the delay caused by her family emergency accounted for only a small portion of the time period. Appellant delayed in propounding discovery, and did not respond to discovery. She did not appear for the mediation and did not object to the mediator until the last possible moment. She did not appear at the status conference or at trial. Further, given that she announced that she would not appear at trial, a continuance would have made no difference.

We next consider appellant's motion for an extension of time to respond to respondents' demurrers to the first amended complaint, a motion which was impliedly denied. Nowhere in her motion or on appeal has appellant even asserted that if given more time to respond to the demurrers, she would have been able to advance legal arguments in support of the sufficiency of her complaint. She had not demonstrated prejudice, and without prejudice, there can be no reversible error. (Cal. Const., art. VI, § 13.)

As to the motion for reconsideration of the rulings on demurrer, "To be entitled to reconsideration, a party should show . . . (1) evidence . . . of new or different facts exist, and (2) the party has a satisfactory explanation for failing to produce such evidence at an earlier time." (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1342.) Appellant cites the death in her family and her need to leave the state, and argues that she satisfied this test. We cannot agree. "New or different facts" means new or different facts about the case, relevant to the ruling at issue. We cannot see that anything about appellant's family emergency constituted new facts about the case, relevant to the demurrer, or that appellant made any other showing of such facts.

We may not review the court's ruling on appellant's motion to disqualify. "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal sought only by the parties to the proceeding." (Code Civ. Proc., § 170.3, subd. (d).)

Finally, we consider appellant's contention that the court erred in denying her a new mediation date. Appellant cites facts which are not in our record,<sup>1</sup> in support of her contention that she told opposing counsel and the mediator that she wanted a different date. She does not argue that she so informed the court, and we thus see no ruling to review.

#### Disposition

The judgment is affirmed. Respondent to recover costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.

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<sup>1</sup> Appellant's request that we take additional evidence on appeal is denied. Matters which were not before the trial court can play no role in our decision here. (*Bach v. County of Butte* (1989) 215 Cal.App.3d 294, 306.)